Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO. 81-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Petitioners,

vs.

JOSEPH H. LERNER, Director of the Division of Alcoholic Beverage Control, IRWIN I. KIMMELMAN, Attorney General of New Jersey, NEW JERSEY LICENSED BEVERAGE ASSOCIATION and NEW JERSEY PACKAGE STORES ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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On the Petition.

CRAIG V. O'CONNOR,
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Question Presented

Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated by the New Jersey statutes which prohibit one class of persons from possessing beneficial interests in more than two alcoholic beverage retail licenses while allowing another class to retain beneficial interests in more than two such licenses?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Petitioners,

vs.

JOSEPH H. LERNER, Director of the Division of Alcoholic Beverage Control, IRWIN I. KIMMELMAN, Attorney General of New Jersey, NEW JERSEY LICENSED BEVERAGE ASSOCIATION and NEW JERSEY PACKAGE STORES ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioners, Romano's Netcong, Inc., Newton Bar & Liquors, Inc., Pasquale T. Romano, Sr., and Dominick V. Romano, pray that a Writ of Certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division entered in the above entitled case on May 20,

1981 (Appendix C, 3a to 4a).* The Supreme Court of New Jersey denied petitioners' request for certification and dismissed the appeal on October 20, 1981 (Appendices A and B, 1a to 2a).

Opinion Below

The opinion of the Superior Court, Appellate Division, is not reported and is printed in full in the appendix to this petition (Appendix C, 3a to 4a).

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on May 20, 1981. The aforementioned petition for certification and appeal were denied and dismissed, respectively, on October 20, 1981. The jurisdiction of this Court is invoked pursuant to Title 28, *United States Code,* §1257.

Constitutional Provisions Involved

Fourteenth Amendment and Twenty-first Amendment of the Constitution of the United States (Appendix G, 15a).

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* The complaint named only Joseph H. Lerner, Director of the New Jersey Division of Alcoholic Beverage Control and John J. Degnan, Attorney General of New Jersey, as defendants. Thereafter, the New Jersey Licensed Beverage Association, the New Jersey Package Stores Association, and the South Jersey Package Stores Association were permitted to intervene as defendants by the trial court. In proceedings before the Superior Court of New Jersey, Appellate Division, on appeal, and before the Supreme Court of New Jersey, on petition for certification, neither the New Jersey Package Stores Association nor the South Jersey Package Stores Association, participated.

Statutes Involved

Title 33, *New Jersey Statutes Annotated, Sections* 1-12.31 and 1-12.35 (Appendix H, 16a).

Statement of the Case

Petitioners, Pasquale T. Romano, Sr., and Dominick V. Romano, hold beneficial interests in two plenary retail alcoholic distribution licenses by virtue of their stockholdings in petitioners, Romano's Netcong, Inc., and Newton Bar & Liquors, Inc. The latter has a second license that it is precluded from utilizing pursuant to N.J.S.A. 33:1-12.31, which limits to two the number of such liquor licenses in which any person may hold a beneficial interest. Other licensees, including chain stores, may possess beneficial interests in more than two retail licenses if such interests were acquired prior to August 3, 1962, the effective date of the aforesaid statute and N.J.S.A. 33:1-12.35.

Discovery provided by the State indicated that a class of multiple license holders, comprised of approximately 180 licensees, each of which possessed more than two licenses, existed at the time the complaint was filed. Each of ten multiple license holders in this class possessed at least ten licenses, and one of those ten, a chain store licensee, possessed more than forty licenses.

The petitioners brought suit in the Superior Court of New Jersey, Law Division, seeking a declaratory judgment that N.J.S.A. 33:1-12.31 and 33:1-12.35 violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The assertion was that the statutes arbitrarily and unreasonably discriminated against petitioners by prohibiting their possession of beneficial interests in more than two licenses while per-

mitting certain competitors to retain beneficial interests in more than two licenses.

The trial court granted defendants' motion for summary judgment, finding no violation of the Equal Protection Clause (Appendix E, 9a to 11a). The Superior Court, Appellate Division, affirmed the trial court's grant of summary judgment, dismissing the constitutional challenge (Appendix C, 4a). Both courts felt bound by the prior decision of the Supreme Court of New Jersey in *Grand Union Co.* v. *Sills,* 43 N.J. 390, 204 A.2d 853 (1964). The Supreme Court of New Jersey denied petitioners' request for certification and dismissed their appeal.

REASON FOR GRANTING THE WRIT

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated by the New Jersey statutes which prohibit certain persons from possessing beneficial interests in more than two alcoholic retail licenses while permitting others to retain beneficial interests in more than two such licenses.

The decisions in this case by both the trial court and the Appellate Division were based primarily on *Grand Union* v. *Sills, supra,* wherein the Supreme Court of New Jersey upheld the license limitation of N.J.S.A. 33:1-12.31 but did not address the issue of the "grandfather clauses" which are contained in that statue and N.J.S.A. 33:1-12.35. There has been a major change in the philosophy of liquor regulation in New Jersey since the former statutory provision was promulgated and considered in *Grand Union.*

Deregulation in many areas is now being implemented through the rule-making process, including those rules

designed to eliminate retail price maintenance and to grant greater latitude in marketing and promotional activities. *Heir* v. *Degnan,* 82 N.J. 109, 117, 411 A.2d 194, 197 (1980) (upholding constitutionality of changes in alcoholic beverage regulations). Notwithstanding this break from the "anticompetition policy which had previously existed," *id.* at 118, 411 A.2d at 197, the decision of the Appellate Division in the instant matter clashes directly with the trend toward free competition.

The New Jersey statutory scheme that regulates the sale of alcoholic beverages prohibits any person from possessing a beneficial interest in more than two alcoholic beverage retail licenses unless such interests were held prior to the effective date of the statutes. The petitioners possess interests in two such licenses but have been prevented by statute from utilizing a third or obtaining more. This arbitrary classification, arising under the aforesaid statutes, is without any legitimate or rational basis, is inimical to the legislative purpose and is, therefore, violative of the Equal Protection Clause of the Fourteenth Amendment.

The Appellate Division did concede that the change of circumstances presented might warrant reconsideration of *Grand Union.* However, the Supreme Court of New Jersey denied certification. Thus it has never spoken to the issue of whether the grandfather clauses of N.J.S.A. 33:1-12.31 and 33:1-12.35 violate the Constitution of the United States. Significantly, neither has this Court spoken to the issue, nothwithstanding that fifteen states limit the number of liquor licenses one person may hold, and six of those have "grandfather clauses" similar to New Jersey's.

In *Grand Union,* chain store operators, each possessing more than two licenses by virtue of the grandfather clauses, challenged the prospective two license per per-

son limitation, (43 N.J. at 404, 204 A. 2d at 860). The Supreme Court of New Jersey upheld that limitation, finding that it was not "entirely without rational basis," since it fostered a public purpose. *Ibid.* The statutory purpose was "to curb relationships and practices calculated to stimulate sales and impair the State's policy favoring trade stability and the promotion of temperance." *Id.* at 404, 204 A. 2d at 860. In other words, N.J.S.A. 33:1-12.31 was enacted as anti-monopoly legislation which would curb chain store liquor operations and aid small liquor dealers. *Id.* at 405-406; 204 A. 2d at 861.

In so holding, the Supreme Court of New Jersey rejected the contention of certain chain stores that the license limitation discriminated against them as against other chain stores, but did not reach the issue as to whether the grandfather clause were itself violative of the Constitution of the United States. That issue was not, and could not have been, raised by plaintiffs in *Grand Union* because they were part of the protected class.

Although at one time the states' power to regulate liquor was considered virtually total, recent decisions of this Court reflect a trend away from automatic deference to state regulation in alcoholic beverage control matters. In *Hotstetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324 (1964), the Twenty-first Amendment was placed in its proper perspective in relation to the rest of the Constitution of the United States. There, this Court stated:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. *Id.* at 332.

Significantly, "passing beyond consideration of the Commerce clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). In the *Craig* case, this Court invalidated an Oklahoma statute which permitted females to drink 3.2% beer at age eighteen but prevented males from doing so until age twenty-one, holding that "the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." *Id.* at 204-205. See also *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178-179 (1972) (state liquor regulatory schemes may not work invidious discrimination violative of the Equal Protection Clause).

Another recent decision involving state liquor regulation, *California Liquor Dealers* v. *Midcal Aluminum*, 445 U.S. 97 (1980), found California's resale price maintenance scheme violative of the Commerce Clause, notwithstanding the Twenty-first Amendment. It was there noted that recent decisions of this Court have stressed that:

> important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. Nor can they [the States] insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, [citing *Craig* v. *Boren*, *supra*] and due process, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). *Id.* at 108.

Therefore, New Jersey's statutory scheme, which favors those who held more than two licenses on August 2, 1962 (by permitting them to maintain such licenses after that date) may be sustained only if it is reasonable in light of the purpose sought to be achieved by N.J.S.A. 33:1-

12.31. Neither the trial court nor the Appellate Division analyzed whether the grandfather clause fostered the stat[illegible] purpose sought to be achieved, *to wit*, the elimina[illegible] of the evils attendant to chain liquor store operatio[illegible]

A legislative classification can be said to comply with the requirements of the Equal Protection Clause only if it "rationally furthers the purpose identified by the State." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976). If the classification is unrelated or inimical to the legislative purpose, it will be set aside. *Ibid.*; *Johnson* v. *Robison*, 415 U.S. 361, 374-375 (1974).

The class of licensees created by these grandfather clauses, N.J.S.A. 33:1-12.31 and N.J.S.A. 33:1-12.35, is dominated by chain stores, nine of which have between ten and nineteen licenses, and one of which has more than forty. Thus, rather than prevent the evils spawned by chain store dominance, the statute perpetuates and, indeed, increases chain store power over the retail market because no other licensee ever can be in a position to compete effectively with these chain stores.

In light of the stated goal of the statute, it would have been rational for the legislature to have provided no grandfather clause and instead to have required all chain stores to divest themselves of all their licenses in excess of two, either immediately, or within a prescribed time. Instead, despite the stated purpose to eliminate chain store relationships and practices calculated to stimulate sales, impair trade stability, and promote intemperance, the grandfather clause ignored both the number of licenses held by the protected class of licensees and the effect of such holdings on the retail liquor market. See *Affiliated Distillers Brands Corp.* v. *Sills*, 56 N.J. 251, 263-264, 254 A 2d. 809, 815-816 (1970).

Affiliated Distillers is relevant in this connection. In that case, a manufacturer challenged a grandfather clause which exempted manufacturers who sold liquor directly to retailers prior to the cutoff date of a statute prohibiting such sales. The Supreme Court of New Jersey held the grandfather clause violative of equal protection, rejecting arguments that the legislature intended to protect investments and that those protected by that clause held such a small market share that they posed no threat to industry stability. It was held that the legislation in question neither protected existing investments nor dealt with problems of size. *Id.* at 264, 265 A. 2d. at 816.

Here, it is clear that the grandfather clause was not intended to protect investment or prevent dislocation in the industry which might result from forced divestiture. Nothing in the statute itself supports either proposition. Moreover, since there are some 12,000 retailers in New Jersey (*Heir* v. *Degnan,* 82 N.J. at 126, 411 A. 2d at 202), it is obvious that the forced divestiture of even two hundred would in no way hinder trade stability. This is especially true because those relatively few licensees include the very ones that the legislature found to be the greatest threat to trade stability.

Even assuming that the grandfather clauses had a rational basis when enacted, circumstances have changed, and no such rationale exists today. Although *Grand Union* found that New Jersey's regulatory scheme "has thus far soundly served the public interest," *Grand Union,* 43 N.J. at 403, 204 A. 2d. at 860, that no longer reasonably can be said. Rather than find that temperance or trade stability had been promoted, the task force established by the Attorney General of New Jersey in 1979 found ". . . illicit trade practices not only among wholesale licensees, but at

all levels of the industry. . . ." *Heir* v. *Degnan*, 82 N.J. at 116, 411 A. 2d. at 197. Among other things, ". . . greater latitude in marketing and promotional activities were also recommended." *Id.* at 117, 411 A. 2d. at 197.

Deregulation has become the policy of New Jersey even though *Grand Union* found that "price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption." *Id.* at 402, 204 A. 2d. at 859. The competition fostered by deregulation has increased the capability of chain store licensees, protected by the grandfather clauses, to dominate the market because they remain economically "the most capable of local advertising and price cutting through private brands. . . ." *Id.* at 402-403, 204 A. 2d. at 859. Moreover, deregulation, by spurring competition, necessarily hinders the goal of temperance in violation of the statute's purposes.

Thus, a statutory scheme designed to prevent chain store dominance through unrestrained competition in order to promote temperance, actually has protected chain stores from effective competition and has disserved the interest in temperance. These results are diametrically opposed to the statute's original purposes. Finally, to deny persons the opportunity to acquire more than two licenses while allowing existing chain stores with multiple licenses to dominate the market denies equal protection of the laws to all persons permanently limited to two licenses.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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On the Petition.

CRAIG V. O'CONNOR,
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On the Petition.

[APPENDICES FOLLOW]

Appendix

APPENDIX A

Order of the Supreme Court of New Jersey Denying Petition for Certification

(Filed—November 2, 1981)

SUPREME COURT OF NEW JERSEY
C-106 SEPTEMBER TERM 1981
18,744

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Plaintiffs-Petitioners,

vs.

JOSEPH H. LERNER, etc., et al.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4630-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1981.

STEPHEN W. TOWNSEND
Clerk

APPENDIX B

Order of the Supreme Court of New Jersey Dismissing Appeal

(Filed—November 2, 1981)

SUPREME COURT OF NEW JERSEY
18,744 SEPTEMBER TERM 1981

ROMANO'S NETCONG, INC., et al.,

Plaintiffs-Appellants,

vs.

JOSEPH H. LERNER, etc., et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1981.

STEPHEN W. TOWNSEND
Clerk

APPENDIX C

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed—May 20, 1981)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4630-79

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Plaintiffs-Appellants,

v.

JOSEPH H. LERNER, Director of the DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN J. DEGNAN, Attorney General of New Jersey, NEW JERSEY LICENSED BEVERAGE ASSOCIATION and NEW JERSEY PACKAGE STORES ASSOCIATION,

Defendants-Respondents.

Argued May 11, 1981—Decided May 20, 1981.

Before Judges Allcorn and Pressler.

On appeal from the Superior Court, Law Division, Morris County.

Appendix C

David S. Piltzer argued the cause for the appellants (Piltzer & Piltzer and Richard C. McDonough, co-attorneys for the appellants; Mr. Piltzer of counsel and on the brief).

Kenneth I. Nowak, Deputy Attorney General, argued the cause for the respondents (James R. Zazzali, Attorney General of New Jersey, attorney; John J. Degnan, former Attorney General of New Jersey; Stephen Skillman, Assistant Attorney General, of counsel; Mr. Nowak on the brief).

Cahill, Wilinski & Cahill submitted a brief on behalf of New Jersey Licensed Beverage Association (William T. Cahill, Jr., on the brief).

PER CURIAM

Plaintiffs, owners of retail liquor stores, appeal from a summary judgment dismissing their constitutional challenge to those provisions of the alcoholic beverage laws limiting licensees to a maximum of two retail licenses each but permitting those licensees who had more than two licenses at the time of the enactment of the law nevertheless to retain them. N.J.S.A. 33:1-12.31, 33:1-12.35.

We affirm substantially for the reasons stated by Judge McElroy in his oral opinion of June 13, 1980. We agree that the New Jersey Supreme Court in *Grand Union Co.* v. *Sills,* 43 N.J. 390 (1964), unequivocally rejected the equal protection and substantive due process arguments here made, albeit raised by parties having variant interests. We are consequently bound by that determination. It may be, as plaintiffs claim, that circumstances have so changed since *Grand Union* was decided as to warrant a reconsideration of its holding. But in any event, reconsideration must be by the Supreme Court.

Affirmed.

APPENDIX D

Order for Judgment of the Superior Court of New Jersey, Law Division

(Filed—June 28, 1980)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MORRIS COUNTY
DOCKET NO. L-38573-78

ROMANO'S NETCONG, INC., a New Jersey Corporation; NEWTON BAR AND LIQUORS, INC., a New Jersey Corporation; PASQUALE T. ROMANO SR., DOMINICK V. ROMANO,

Plaintiffs,

vs.

JOSEPH H. LERNER, Director of New Jersey Division of Alcoholic Beverage Control; JOHN J. DEGNAN, Attorney General of New Jersey; NEW JERSEY LICENSED BEVERAGE ASSOCIATION; NEW JERSEY PACKAGE STORE ASSOCIATION; SOUTH JERSEY PACKAGE STORES ASSOCIATION,

Defendants.

This matter having been opened to the Court by William T. Cahill, Jr., Esquire, by way of a Motion for Summary Judgment on behalf of the New Jersey Licensed Beverage Association; and

Appendix D

It appearing that David Piltzer, Esquire, on behalf of the plaintiffs, also moved for Summary Judgment; and

It appearing that Kenneth I. Nowak, Deputy Attorney General representing John J. Degnan, Attorney General of New Jersey and Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control also moved for Summary Judgment; and

It appearing that Frederic R. Cohen, Esquire, representing the New Jersey Package Stores Association and the South Jersey Package Stores Association; and

It further appearing that the Court having heard oral argument on this matter on June 13, 1980 and being of the opinion that there was no genuine issue as to any material facts and further of the opinion that the defendants were entitled to judgment.

IT IS HEREBY ORDERED on this 28th day of June, 1980, that Summary Judgment be entered in favor of the defendants, Joseph H. Lerner, John J. Degnan, New Jersey Licensed Beverage Association, and the New Jersey Package Stores Association and South Jersey Package Stores Association, and against the plaintiffs, and further that the plaintiffs' Motion for Summary Judgment is denied.

WILLIAM T. MCELROY, J.S.C.

APPENDIX E

Oral Decision of the Honorable William T. McElroy, J.S.C.
(June 13, 1980)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MORRIS COUNTY
DOCKET NO. L-38573-78

ROMANO'S NETCONG, INC.,

Plaintiff,

vs.

JOSEPH H. LERNER, et al.,

Defendants.

June 13, 1980
Morris County Courthouse
Morristown, New Jersey 07960

Before:

HONORABLE WILLIAM T. MCELROY, J.S.C.

Transcript ordered by:

RICHARD C. MCDONOUGH, ESQ.

Appearances:

MESSRS. PILTZER & PILTZER
By: DAVID S. PILTZER, ESQ.,
and
RICHARD C. MCDONOUGH, ESQ.,
For Romano's Netcong, Inc.

Appendix E

MESSRS. CAHILL, WILINSKI & CAHILL
By: WILLIAM T. CAHILL, JR., ESQ.,
For N. J. Beverage Association.

KENNETH I. NOWAK, ESQ.,
Deputy Attorney General
For the Defendant Lerner.

(2)* The Court: All right, gentlemen, thank you for your assistance in this case. I have read your briefs and, of course, this matter is brought, actually, as a complaint for a declaratory judgment wherein apparently the parties feel that what is presented to the Court is sufficient for the purposes of its decision and so in that manner the defendant moves for summary judgment as well as does the plaintiff.

The only evidence presented to the Court is, of course, that of the affidavit of Pasquale G. Romano, Sr., who is president of both the corporate plaintiffs and, of course, the material that has been referred to by counsel which is supplied by way of answers to interrogatories. It is, of course, a settled rule that factual support for the legislative judgment in dealing with an attack such as this upon the constitutionality of a statute, that factual support for the legislative judgment is presumed and absent of sufficient showing to the contrary the Court should assume that the enactment rested upon some rational basis within the knowledge and experience of the Legislature.

(3) The Grand Union case which is one which has been discussed at length by counsel traces, as we read it, we all have, I gather, quite at length, traced the development of the liquor legislation including the prior holding

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* Numbers in parentheses refer to the trial transcript.

reaffirms the State's practically limitless power to regulate the liquor industry. Dealing with this very statute, albeit not directly with the Grandfather Clause, the Court says that the statute must fairly be considered as being in furtherance of the outstanding—longstanding legislative policy aimed at relationships and practices calculated to stimulate sales and impair the State's policy favoring stability and the promotion of temperance in the liquor field.

The Supreme Court in that case also said relative to the statute and the attack made upon it, "In any event, we do not sit here as a super Legislature nor do we concern ourselves with the wisdom of Chapter 152. Our function is to determine whether the Legislature has gone beyond the outer limits of its constitutional power. Even when dealing with an essential commodity the Legislature is said to have broad (4) power to adopt trade prohibitions and regulations deemed necessary for the protection of the public health, safety, morals and general welfare," citing cases, "and as has already been pointed out when dealing with nonessential inherently dangerous commodity such as liquor, its power is said to be almost without limit."

The Supreme Court went on to say relative to that case and the record before them at the time, "The record before us does not support the allegation in the complaint that Chapter 152 has no observable public purpose. It was enacted solely for the benefit of private interests. The fact that it was sponsored or supported by organizations should private interest happen to coincide with the public interests, as determined by the Legislature, in no wise impairs its validity of effectiveness," citing cases and continuing to quote, "The main point relied upon then by appellant in the brief on appeal is that 'the two license lim-

itation does not bear a reasonable relationship to any public purpose, denies due process and equal protection of the law. The public purpose was to curb relationships and practices calculated to (5) stimulate sales and impair the State's policy favoring trades, stability and the promotion of temperance and while some may consider other regulatory courses to be preferable, we cannot say that the course chosen by the Legislature and pursued in Chapter 152 is entirely without rational basis,'" citing a case, "nor do we find any infringement of the constitutional guarantees of due process and equal protection. The appellants hold renewable, annual license privileges which are not being taken away from them although they will have no right to acquire additional license privileges contrary to the policy embodied in Chapter 152. There is nothing in the constitutional clauses which guarantees any such right. The Legislature may, without at all infringing upon the due process clause, either terminate or severely regular all liquor sales within the State. So long as the regulations contain no irrational classifications or invidious discriminations they do not conflict with the equal protection clause."

Now, the main thrust of the plaintiffs in the case at hand is, of course, directed to (6) the Grandfather clause of the statute which plaintiffs contend discriminates because those retailers who before August of 1962 had more than three retail licenses are permitted to retain them while plaintiff cannot acquire more than two such licenses. Aside from the bare conclusions asserted in the brief and made in the affidavit of Mr. Romano, no evidence has been supplied to demonstrate that this clause has been an irrational or invidious—is irrational or invidious for that clause fails to bear any reasonable relationship

to the public purpose and, in fact, denies due process or equal protection under the law.

To the contrary, the clause makes no distinction between types of licensees whether chainstore or nonchainstores after August, 1962, no retailer can acquire more than two licenses. All those who had more than two licenses before that date are left undisturbed. The Legislature presumably acted in a constitutional manner and on its face this Grandfather Clause makes a permissible distinction.

It does, I submit, follow the obvious legislative purpose and further tends to protect (7) investments in more than two licenses which were had prior to the passage of the act and in *Affiliated Distillers* vs. *Sills* that type of consideration, that is, preservation of business, does satisfy dictates of fairness and to avoid hardships is recognized as a legitimate legislature concern.

Like the Supreme Court in the *Grand Union* case, I did not sit for the purposes of trying to be a super Legislature and while one might feel that there are other ways that could have been done, that is not the purpose of the judicial function. It appears to me that the case presented is one which is not violative of the constitutional requirements and therefore, the plaintiff's motion for summary judgment is denied and summary judgment is granted on behalf of the moving defendants.

Thank you.

Mr. Cahill: Shall I submit the order, Judge?

The Court: Please do.

* * *

APPENDIX F

Complaint for Declaratory Judgment

(Filed—April 9, 1979)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MORRIS COUNTY
DOCKET No. L 38573-78

ROMANO'S NETCONG, INC., A New Jersey Corporation, NEWTON BAR & LIQUORS, INC., A New Jersey Corporation, PASQUALE T. ROMANO, SR., AND DOMINICK V. ROMANO,

Plaintiffs,

v.

JOSEPH H. LERNER, DIRECTOR OF THE NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL AND JOHN J. DEGNAN, ATTORNEY GENERAL OF NEW JERSEY,

Defendants.

Romano's Netcong, Inc., a New Jersey corporation doing business at Lackawanna Plaza, Route 46, Netcong, New Jersey, Newton Bar & Liquors, Inc., a New Jersey corporation doing business at Shop-Rite Plaza, Route 206, Newton, New Jersey, Pasquale T. Romano, Sr., residing at Ithanell Road, Landing, New Jersey, and Dominick V. Romano, residing at 62 Musconetcong Avenue, Stanhope, New Jersey, complaining of the defendants, says:

Appendix F

Count One

1. Plaintiff Romano's Netcong, Inc. is the holder of a plenary retail distribution alcoholic beverage license issued by the Borough of Netcong, Morris County, New Jersey.

2. Plaintiff Newton Bar & Liquors, Inc. is the holder of two plenary retail consumption alcoholic beverage licenses issued by the Town of Newton, Sussex County, New Jersey. One of said licenses is currently being used, while the other is not.

3. Plaintiffs Pasquale T. Romano, Sr. and Dominick V. Romano hold a beneficial interest and are stockholders and officers in each of the corporate plaintiffs Romano's Netcong, Inc. and Newton Bar & Liquors, Inc.

4. Defendant Joseph H. Lerner is the Director of the New Jersey Division of Alcoholic Beverage Control and, as such, is the chief executive officer of the Division of Alcoholic Beverage Control, N.J.S.A. 33:1-3, and is responsible for enforcing the provisions of the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-23.

5. John J. Degnan is the Attorney General of the State of New Jersey and, as such, has the authority to defend the constitutionality of all state statutes.

6. Each of the four plaintiffs herein wish to acquire additional retail alcoholic beverage licenses, and beneficial interests therein, in order to compete in the alcoholic beverage business with chain store licensees holding and using more than two such licenses, but they are precluded from doing so by reason of N.J.S.A. 33:1-12.31 to 12.38 of the New Jersey Alcoholic Beverage Law, which prohibits any person, including corporations, from ac-

quiring a beneficial interest in more than two retail alcoholic beverage licenses. Such chain stores are authorized to hold and use more than two such licenses by the grandfather clause provision of N.J.S.A. 33:1-12.35, and they are presently using such licenses in competition with the plaintiffs.

7. Plaintiff Newton Bar & Liquors, Inc. is precluded from using one of its plenary retail consumption licenses because of the provisions of N.J.S.A. 33:1-12.31 to 12.38, said license having been acquired subsequent to the passage of said statute.

8. The provisions of N.J.S.A. 33:1-12.35 unlawfully discriminates against plaintiffs by reason of their creation of a special class of chain store liquor licensees who are in a position to unfairly compete against plaintiffs. Said statute is unconstitutional because it sets up an arbitrary, irrational and unreasonable classification and individually discriminates against plaintiffs, denying to them the equal protection of the laws contrary to the New Jersey and United States Constitutions.

9. N.J.S.A. 33:1-12.35 is not severable from N.J.S.A. 33:1-12.31 to 12.38 and therefore all of said statutory sections are invalid.

WHEREFORE plaintiffs demand judgment declaring that the aforementioned statutes are unconstitutional and invalid and that they do not preclude the plaintiffs from acquiring additional retail alcoholic beverage licenses, and beneficial interests therein, and that the plaintiffs have such other and further relief as is appropriate.

PILTZER & PILTZER
and
RICHARD C. McDONOUGH
Co-Attorneys for the Plaintiffs
By: DAVID S. PILTZER

Dated: April 6, 1979.

APPENDIX G

Relevant Provisions of United States Constitution Cited

Fourteenth Amendment, Section 1, to the United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Twenty-first Amendment, Section 2, to the United States Constitution.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

APPENDIX H

Relevant Statutes Cited

Title 33, New Jersey Statutes Annotated, §1-12.31

Acquisition of beneficial interest in more than two retail licenses prohibited

On and after the effective date of this act no person, as the same is defined in R.S. 33:1-1, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on August 3, 1962, such an interest in more than two such licenses to surrender, dispose of, or release his interest in any such license or licenses.

Title 33, New Jersey Statutes Annotated, §1-12.35

Right to continue to hold, use and renew existing licenses.

Nothing in this act shall affect the right of any holder of retail licenses heretofore acquired to continue to hold, use and renew such licenses.

Opposition

NO. 81-1352

Office - Supreme Court, U.S.
FILED
FEB 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Petitioners,

vs.

JOSEPH H. LERNER, Director of the Division of Alcoholic Beverage Control, IRWIN I. KIMMELMAN, Attorney General of New Jersey, NEW JERSEY LICENSED BEVERAGE ASSOCIATION and NEW JERSEY PACKAGE STORES ASSOCIATION,

Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW JERSEY

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NO. 81-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROMANO'S NETCONG, INC., NEWTON BAR & LIQUORS, INC., PASQUALE T. ROMANO, SR., and DOMINICK V. ROMANO,

Petitioners,

vs.

JOSEPH H. LERNER, Director of the Division of Alcoholic Beverage Control, IRWIN I. KIMMELMAN, Attorney General of New Jersey, NEW JERSEY LICENSED BEVERAGE ASSOCIATION and NEW JERSEY PACKAGE STORES ASSOCIATION,

Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW JERSEY

Statement of the Case

This case is a challenge to that portion of the New Jersey alcoholic beverage control statute which prohibits the holding of more than two alcoholic beverage retail licenses while authorizing those holding an excess of two licenses at approximately the effective date of the provision to retain those licenses. N.J.S.A. 33:1-12.31 provides:

> "On and after the effective date of this act no person, as the same is defined in R.S. 33:1-1, shall, except as hereinafter provided, acquire a beneficial inter in more than a total of two alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on August 3, 1962, such an interest in more than two such licenses to surrender, dispose of, or release his interest in any such license or licenses."*

Offenders can be punished by monetary fine and other disciplinary sanctions. N.J.S.A. 33:1-12.37. The petitioner Newton Bar & Liquors holds two plenary retail consumption licenses, only one of which is currently in use, while the petitioner Romano's Netcong, Inc. holds one such license; the petitioners Pasquale and Dominick Romano hold beneficial interests in and are stockholders and officers of both Newton Bar & Liquors and Romano's Netcong. The petitioners wish to acquire additional licenses, but are prevented from doing so by the statutory prohibition.

On April 9, 1979 the petitioners filed with the Law Division of the Superior Court of New Jersey their complaint demanding a declaratory judgment that the statutory pro-

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* Succeeding sections, N.J.S.A. 33:1-12.32 through 12.36, contain exceptions to the two-license limitation rule which are not pertinent here.

vision denied equal protection. Their allegation focused upon the grandfather clause aspect of the statute, by which certain persons who had held more than two retail licenses before August 1962 had been legislatively authorized to retain them. According to the complaint, the statute had created a class of licensees who could "unfairly compete" against them (Pa14). The petitioners' complaint did not mention the rules adopted by the Director of the New Jersey Division of Alcoholic Beverage Control which permit licensees to advertise cooperatively and to purchase cooperatively in conformity with regulatory standards intended to avoid monopolistic practices. N.J.A.C. 13:2-24.10; N.J.A.C. 13:2-26.1*

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* With respect to cooperative advertising, New Jersey retailers may join together for that purpose under the following conditions:

> "No manufacturer, importer, registrant, wholesaler, distributor or retailer shall include in any advertising material or in any advertisement, directly or indirectly, any statement, registration, design, device, name, symbol, sign or representation that:
>
> * * *
>
> 7. Offers alcoholic beverage pricing information in affiliation with other non-identically owned licensees in a communication which fails to truthfully disclose and prominently indicate:
>
> i. The identity of the individual licensee who established the pricing information; and
>
> ii. That the specific prices and products featured may not be available at all businesses represented or indicated as being affiliated." N.J.A.C. 13:2-24.10 (a)(7).

With respect to cooperative purchases, a retail licensee may join with other retail licensees in a cooperative agreement for the pur-

(Footnote continued on following page)

On June 13, 1980 the trial court granted the defendants' motion for summary judgment while denying a cross-motion for summary judgment made by the petitioners (Pa7 to Pa11), and final judgment was entered on June 28, 1980 (Pa5). On May 20, 1980 the Appellate Division of the Superior Court of New Jersey affirmed that judgment (Pa3), with the Supreme Court of New Jersey on November 2, 1981 denying the petitioners' petition for certification and dismissing their notice of appeal (Pa1, Pa2).

(Footnote continued from preceding page)

chase and transportation of alcoholic beverages. N.J.A.C. 13:2-26.1(a). The retail licensees participating are not to exceed in number the largest number of retail licenses issued to any one person; they are not to exceed, in other words, the largest of the "chains" which continue to exist under the grandfather clause of the two-license legislation. N.J.A.C. 13:2-26.1(a)(2). The cooperative agreement may not, however, "prohibit any licensee from joining any other cooperative agreement," N.J.A.C. 13:2-26.1(a)(3), nor "prohibit any retailer from advertising or selling any product at any otherwise lawful price. . . ." N.J.A.C. 13:2-26.1(a)(4). A licensee may withdraw from a cooperative agreement upon 30 days written notice without incurring any penalty. N.J.A.C. 13:2-26.1(a)(5).

ARGUMENT

Under numerous precedents of this Court a state may adopt any rational means to regulate socio-economic affairs, especially those involving the alcoholic beverage business, and since the New Jersey statutory limitation upon liquor license holding with its grandfather clause exception is a rational means of minimizing market concentration in the liquor trade while not imposing the hardship of forced divestiture, the State has not denied equal protection and this Court should decline to grant certiorari.

The petitioners' challenge to the two-license limitation contained within the New Jersey alcoholic beverage control statute is remarkably limited and exceedingly conventional, comprising nothing more than a garden-variety equal protection argument addressed to a statutory provision which clearly represents under decisions of this Court an appropriate exercise of the State police power to regulate the liquor trade and which was held valid by the Supreme Court of New Jersey nearly two decades ago. In soliciting review by this Court the petitioners would bear a burden which is, to say the least, formidable, for they must persuade this Court to intervene not only despite the broad deference long accorded State regulatory enactments of any kind, but also despite the especially expansive deference accorded legislative provisions designed to control the alcoholic beverage business. In point of fact, under the standards of review established by this Court with respect to State legislative measures intended to regulate socio-economic affairs generally and commerce in alcoholic beverages in particular the petitioners have demonstrated no warrant whatever for the granting of *certiorari*.

The pertinent constitutional principles need be only briefly stated. State statutes enacted to govern social and economic matters and not implicating any fundamental right will not be invalidated because they may be considered "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1954). Rather, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* Constitutional safeguards are offended "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). Furthermore, the judicial inquiry is not to be whether the provision will actually further a rational goal, but only whether a theoretical relationship exists between the provision and its purpose. *Minnesota* v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S. Ct. ——, 66 L. Ed. 2d 659, 668 (1981).

A deference to State legislative acts which is, if anything, even broader is called for when the State provision controls the intrastate distribution of alcoholic beverages. On many occasions over the decades this Court has affirmed that "a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries" and that "a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold." *New York State Liquor Authority* v. *Bellanca,* —— U.S. ——, 101 S. Ct. ——, 69 L. Ed. 2d 357, 360 (1981). The "broad sweep" of the Twenty-first Amendment "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals," *California* v. *La Rue,* 409 U.S. 109, 112, 93 S. Ct. 390, 34

L. Ed. 2d 342 (1972), and especially when a regulatory enactment concerns the intrastate distribution and consumption of alcoholic beverages the Twenty-first Amendment "demands wide latitude for regulation by the State." *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U.S. 35, 42, 86 S. Ct. 1254, 16 L.Ed. 2d 336 (1966). For good reason has the Supreme Court of New Jersey said that the legislative power over the alcoholic beverage business is "practically limitless" and that the sale of liquor "may be prohibited entirely or severely curtailed." *Affiliated Distillers Brands Corp.* v. *Sills,* 56 N.J. 251, 256 (1970); *Blanck* v. *Mayor & Borough Council of Magnolia,* 38 N.J. 484, 490 (1962).

As have other jurisdictions, see *Grand Union Co.* v. *Sills,* 43 N.J. 390, 399-400 (1964), New Jersey has perceived abuse to be inherent in certain kinds of relationships within the alcoholic beverage industry, such as those between manufacturer and wholesaler and those among the various retailers. For example, N.J.S.A. 33:1-43 prohibits the so-called "tied house," through which a manufacturer holds an interest in a wholesaler or retailer and thus can control the prices at which its products are sold; the Supreme Court of New Jersey affirmed the validity of that prohibition, noting the reasonable relationship of the provision to the legislative policy of promoting market stability and consumer temperance. *Affiliated Distillers Brands Corp.* v. *Sills,* 56 N.J. at 260. It is the same legislative perception of abuse which has prompted the statutory restriction upon holding more than two retail licenses.

The legislative rule declared in N.J.S.A. 33:1-12.31 is straightforward in language and plain in policy: "no person . . . shall . . . acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses . . .". As the Supreme Court of New Jersey said in *Grand Union*

Co. v. *Sills, supra,* one of the concerns was that "domination of retail establishments by distillers or other economically powerful interests, or the concentration of retailing in the hands of an economically powerful few, would intensify the dangers of sales stimulations and other abuses and would be inimical to temperance and trade stability." 43 N.J. at 402. The court noted that "we do not sit here as a superlegislature nor do we concern ourselves with the wisdom of [the statute]." *Id.* at 403. The judicial function, then as now, was solely to identify any rational basis underlying the provision:

> "The public purpose was to curb relationships and practices calculated to stimulate sales and impair the State's policy favoring trade stability and the promotion of temperance; and while some may consider other regulatory courses to be preferable, we cannot say that the course chosen by the Legislature and pursued in [N.J.S.A. 33:1-12.31 *et seq*] is entirely without rational basis." *Id.* at 404.

The rational basis for the measure was thus evident on the face of the statute.

Clearly, therefore, the two-license limitation is supported by the reasonable legislative perception of how the liquor trade might most effectively be controlled. In enacting the provision the New Jersey Legislature evidently believed that the available retail licenses were being concentrated into fewer and fewer hands and that such concentration could well beget adverse social consequences. The Supreme Court of New Jersey mentioned a number of such possible consequences, including absentee ownership and domination of retail establishments by distillers or other economically powerful interests. *Grand Union Co.* v. *Sills,* 43 N.J. at 402. Legislative con-

cern over those tendencies is certainly not limited to the liquor industry, for, after all, the Sherman Act, 15 U.S. C.A. §1 *et seq.*, as well as the New Jersey Anti-Trust Act, N.J.S.A. 56:9-1 *et seq.*, has been designed to protect against economic concentration. The Legislature in New Jersey was equally entitled to seek to guard against that possibility in the alcoholic beverage field. The petitioners may question the accuracy of the legislative perception and the wisdom of the legislative action, but the choice of means is not theirs. It is for the New Jersey Legislature alone.

At this juncture, in view of the petitioner's repeated references to alcoholic beverage "deregulation" in New Jersey (Ab4 to Ab5, Ab9 to Ab10), some brief word is appropriate concerning that regulatory policy, since it does not by any means denigrate the legislative purpose of minimizing market concentration. As summarized in *Heir* v. *Degnan*, 82 N.J. 109, 114-118 (1980), in 1977 the Attorney General of New Jersey established a task force to determine whether existing regulations should be altered to improve control over the trade practices of the alcoholic beverage industry. A task force report as well as public hearings substantiated the presence of abuse; as the Supreme Court of New Jersey would later observe, among other difficulties the prior regulations had "resulted in the functional equivalent of horizontal price fixing. . . ."* *Id.* at

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* This capacity for controlling prices by the industry had occurred because the rules required every manufacturer of wine or distilled spirits selling to a New Jersey wholesaler to file with the administrative agency quarterly price schedules which then became binding. Each manufacturer was also required to "affirm" that its prices for distilled products in New Jersey were at the lowest price at which those products were being sold anywhere in the United States, and manufacturers also filed quarterly schedules of

(Footnote continued on following page)

115. The Director of the New Jersey Division of Alcoholic Beverage Control in April 1979 adopted a set of administrative rules—popularly termed, somewhat misleadingly, as "deregulation"—designed to overcome that abuse. The rules were held valid in *Heir* v. *Degnan*.

Nevertheless, this process of administrative "deregulation" does not mean, as the petitioners apparently assume, that all regulatory constraints have been lifted, with market control now to be determined by the bloody tooth and claw. The Supreme Court of New Jersey in *Heir* v. *Degnan* recognized that only the administrative superstructure was being undone, not the legislative foundation. The Alcoholic Beverage Control Director had determined, in fact, that the old regulatory approach should be substantially modified precisely in order that he might "carry out the broad purposes of the [alcoholic beverage

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(Footnote continued from preceding page)

minimum consumer resale prices binding on all retailers. The manufacturer thus had nearly absolute control of its prices to wholesalers and was also free to set the minimum at which its product was sold to the consumer. At the wholesale level, moreover, prices from wholesaler to retailer were fixed by the wholesaler through quarterly price listings, whose accessibility to other wholesalers permitted corresponding retail price increases or decreases. *Heir* v. *Degnan, supra*, 82 N.J. at 115.

Consequently, the system of "posting" prices and other allowed procedures had conferred for practical purposes a legal imprimatur upon outright price-fixing and its inevitable excessive profits. Licensees were also tempted to utilize marketing and other techniques legitimately used by unregulated businesses in order to "compete" within an industry facially preserved from competition and thus derive even higher profits than those resulting from the controls themselves. *Id.* at 116. The existing regulatory system obviously was doing more harm than good and demanded dismantling.

control] act and serve the public interest." *Id.* at 121-122. The regulatory approach bearing the *nom de plume* of "deregulation" is a carefully fashioned matrix of rules designed to further the basic legislative purpose in light of current circumstances. Price competition is now administratively authorized, but only because of empirical studies indicating that it will not encourage intemperance. *Id.* at 122. Sales below cost are forbidden, however, N.J.A.C. 13:2-24.8, because of the agency recognition that price competition can lead to abuses and must remain under regulatory control. In sum, the system of administrative regulation was only altered so as to address current circumstances more effectively, not abandoned in favor of *laissez faire.*

The interest in minimizing economic concentration within the liquor industry therefore remains a potent element of New Jersey public policy. The petitioners here do not even dispute that fact, for their complaint is that, according to their own lights, the State Legislature should weight that interest far more heavily in comparison to the innumerable other interests which comprise public policy. The petitioners would prefer that those persons holding more than two licenses under the grandfather clause of the 1962 legislation be directed to divest themselves of those additional licenses. Since the New Jersey Legislature has not yet subscribed to their views of social justice, they would have this Court accomplish the task instead. In so demanding the petitioners ignore the often-repeated admonition of this Court that a legislature may address a social problem "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Bd. of Election Comm'rs of Chicago,* 394 U.S. 802, 809, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969), quoting *Williamson* v.

Lee Optical of Oklahoma, supra, 348 U.S. at 489. A legislature "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *McDonald* v. *Bd. of Election Comm'rs of Chicago, supra.*

It is the grandfather provision which constitutes the nub of the petitioners' dissatisfaction, yet as dissatisfied as they may be, the exception authorizing continued holding of an excess of two licenses by those possessing them on a particular date is as constitutionally valid as the affirmative rule forbidding others not to amass such additional holdings after that time. Grandfather clauses are, of course, common in statutes encompassing a broad range of subject areas, often being warranted because, once a regulatory scheme is initially adopted, existing businesses are appropriately to be preserved in the interest of fairness and the avoidance of hardship. *Federal Communications Comm'n* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 804, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978). Such clauses are nothing more than a species of reasonable legislative classification, and they have generally been held valid. *Federal Communications Comm'n* v. *National Citizens Committee for Broadcasting, supra; New Orleans* v. *Dukes,* 472 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976); *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4, 91 S. Ct. 16, 27 L. Ed. 2d 4 (1970); *Paul Kimball Hospital, Inc.* v. *Brick Twp. Hospital, Inc.,* 86 N.J. 429 (1981).

A legislative body may thus reasonably conclude, without fear of subsequent judicial invalidation, that even though a particular activity is conducive to social evil, the number of entities engaged in that activity, if not later increased, is not so large as to be intolerable. At

issue in *New Orleans* v. *Dukes* was a New Orleans municipal ordinance which banned pushcart vendors from the French Quarter, but which exempted those vendors who had operated there for eight or more years previously. This Court refused to invalidate the grandfather aspect of the ordinance, pointing out that the older vendors had in effect become part of the distinctive community character which the ordinance meant to maintain. 472 U.S. at 305. In *Federal Communications Comm'n* v. *National Citizens Committee for Broadcasting*, similarly, this Court affirmed the judgment of the Federal Communications Commission that even though the initial licensing of a radio or television station owned by a local daily newspaper should be barred, divestiture would not be required of existing broadcast-newspaper combinations; not only had the existing groupings provided adequate public service, but unnecessary hardship would be imposed upon them in particular, with economic dislocations befalling the industry in general. 436 U.S. at 803-809.*

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* Although the petitioners rely upon *Affiliated Distillers Brands Corp.* v. *Sills, supra,* for the proposition that the grandfather clause involved here "was not intended to protect investment or prevent dislocation in the industry which might result from forced divestiture" (Pb9), the terms of the statute themselves disclose that such was a rational basis justifying the grandfather provision. The present situation is, it may be noted, entirely unlike that in *Affiliated Distillers Brands*, for the grandfather clause there shielded from a prohibition upon liquor manufacturer/wholesaler combinations those who had filed wholesale to retail price lists before a certain date. The hypothesis that the Legislature had dealt with manufacturers on the basis of size and resulting impact upon the industry was belied by the fact that a protected manufacturer would remain protected even upon increasing its share of the market. 56 N.J. at 264.

(Footnote continued on following page)

The New Jersey Legislature in 1962 plainly reached the same sort of conclusion regarding license holding in the liquor industry. The trend toward economic concentration had to be halted, but the reality was that concentration had already been proceeding apace, with certain persons having already obtained numbers of licenses beyond the two which would now be the rule. The Legislature consequently dealt with the practical circumstances and so chose not to impose the hardship of divestiture upon operators who had been offering service to the community and whose ownership of licenses, if not subsequently enlarged, was not perceived to contribute substantially to the social evil intended to be avoided. Under unquestioned constitutional doctrine the Legislature was entitled to make this choice. To be sure, the petitioners are correct in observing that "it would have been rational for the legislature to have provided no grandfather clause and instead to have required all chain stores to divest themselves of all their licenses in excess of two, either immediately, or within a prescribed time" (PbS). The point is, however, that the choice which the Legislature *did* make was also rational, and this Court does not sit to substitute for one rational means of achieving a desired social goal another which some may find preferable. The fashioning of measures to remedy social conditions is, *par excellence,* the role of the Legislature,

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(Footnote continued from preceding page)

By contrast, the two-license provision is far different. On the very face of the requirement the legislative purpose to minimize market concentration is clear, and that purpose is confirmed in the exception. Those who held more than two licenses in 1962 may retain them on the premise that the adverse economic consequences will be relatively mild. Nevertheless, they may not contribute more to the market concentration problem by acquiring additional licenses.

and the judiciary is not to intrude upon that prerogative.

The petitioners are not without recourse. Despite their assertion that "no other licensee ever can be in a position to compete effectively with [the] chain stores" (Pb8), the revised administrative rules of the New Jersey Division of Alcoholic Beverage Control which modified previous regulatory practice in the State have been drafted to afford non-chain licensees a meaningful competitive alternative. Under N.J.A.C. 13:2-26.1 non-chain licensees may join into groups possessing as many plenary distribution licenses as have been issued to the largest of the chains to purchase and transport liquor cooperatively, and under N.J.A.C. 13:2-24.10 such licensees may also cooperatively advertise. Regulatory restrictions do exist, but those restrictions are entirely unexceptionable in light of the public policy involved. For instance, no cooperative agreement may prohibit a licensee from joining any other cooperative agreement, N.J.A.C. 13:2-26.1(a)(3), nor may it prohibit a retailer from advertising or selling any product at any otherwise lawful price. N.J.A.C. 13:2-26.1(a)(4). Similarly, when licensees cooperatively advertise they must do so through communications which disclose truthfully and indicate prominently the identity of the individual licensee who established the pricing information and the fact that the specific prices and products featured may not be available at all affiliated businesses. N.J.A.C. 13:2-24.10(a)(7). The petitioners thus have available to them a regulatory mechanism which was devised by the Division not only to permit them to compete effectively but, not so incidentally, to have them do so in a manner consonant with that public policy lying at the core of the two-license limitation itself—the policy against market concentration in the liquor industry.

The petitioners are not without recourse in a more fundamental sense as well. The Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey declined to become involved in the petitioners' statutory challenge because they recognized, as has this Court on many occasions, that the judiciary is not designed to cure every malady afflicting the human community. Those courts recognized that legislative and regulatory supervision of an industry as intricate as the alcoholic beverage business calls for a weighing of a multitude of social circumstances and interests, with no particular solution clearly representing the ideal solution. This Court too should decline to intervene, for the two-license limitation with its exception, while perhaps not pleasing to all, does plainly represent a reasonable legislative response to a social condition perceived to call for remedying. If these petitioners are dissatisfied with that legislative response, they may petition the New Jersey Legislature for what they consider the appropriate redress. Redress is not available from this Court. The petition for *certiorari* should be denied.

CONCLUSION

For these reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

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Respectfully submitted,

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